Supreme Court, U.S.
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ALEXANDER L. STEVAS
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NO. 81-1809

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981.

STATE OF ALABAMA,
PETITIONER

VS.

EDWARD HORSLEY,

RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT AND THE COURT OF CRIMINAL APPEALS OF ALABAMA

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QUESTION PRESENTED

DOES THE DECISION OF THIS HONORABLE COURT IN THE BECK V. ALABAMA (447 U. S. 625 [1980]) REQUIRED THE AUTOMATIC RETRIAL OF ALL CASES TRIED UNDER THE ALABAMA CAPITAL PUNISHMENT STATUTE PRIOR THERETO WITHOUT REGARD TO THE EVIDENCE?

PARTIES

In the Circuit Court of Monroe County, Alabama, and the Court of Criminal Appeals of Alabama, and the Supreme Court of Alabama, the parties were: The State of Alabama, Petitioner herein and Edward Horsley, Respondent herein.

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The Opinions or orders of the Court of Criminal Appeals of Alabama is not yet reported but will be reported as:

Edward Horsley v. State, (Cr. App. Ala., 1981) _____ So. 2d _____.

The same is submitted herwith as Appendix "A", hereto.

The Opinion and orders of the Supreme Court of Alabama are not yet reported but will be reported as:

Ex Parte: State, In Re: Horsley v. State, (S. Ct. Ala. 1981) _____ So. 2d _____.

The Same are submitted herewith as Appendix "B".

JURISDICTION

The order of the Supreme Court of Alabama denying certiorari was issued January 29, 1982, and this petition is filed within sixty (60) days of said date:

The jurisdiction of this Honorable Court is invoked under 28 United States Code, Section 1257.

CONSTITUTIONAL PROVISIONS INVOLVED

Section one of the Fourteenth Amendment to the Constitution of the United States which reads as follows:

> "...All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and the State wherein they reside. No State shall make or enforce any law which shall abridge the privilege or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty or property, without due process of law; nor deny any person within its jurisdiction of equal protection of the law..."

STATUTORY PROVISIONS INVOLVED

Code of Alabama, 1975, Title 13, and Sections 13-11-1 through 13-11-9.

STATEMENT OF THE CASE

Edward Horsley was indicited by the Monroe County, Alabama, Grand Jury, Spring Session, 1977, for the robbery and intentional killing of Naomi Bolon.

Horsley entered a plea of not guilty and came to be tried under that plea. He called no witnesses on his behalf nor did he take the stand as a witness in his own defense.

The verdict of the jury was guilty as charged. The jury's verdict also recommended that the sentence be fixed at death. After conducting an "aggravation/ mitigation" hearing the trial judge sentenced Horsley to death.

Horsley filed a Notice of Appeal

and briefs were filed in the Alabama Court of Criminal Appeals. An opinion was issued on October 3,1978, by the Court in which the conviction was affirmed. Application for rehearing was denied on October 31, 1978.

Said conviction was also affirmed by the Alabama Supreme Court on June 1, 1979.

After Horsley's petition for Writ of Certiorari was filed in this Court , an order was issued on June 30, 1980 remanding the case back to the Alabama Supreme Court in light of Beck v. Alabama, 447 U. S. 625, 65 L. Ed. 2d 392, 100 S. Ct. 2382(1980).

This resulted in the reversal of the conviction by the Alabama Court of Criminal Appeals on October 6, 1981. After denial of rehearing the Alabama Supreme Court refused to consider the case on the State's petition for Writ of Certiorari on January 29, 1982. This

petition is filed within sixty days of that denial.

STATEMENT OF THE FACTS

On the night of March 12, 1977, Naomi Rolon, age sixteen, left her house in Hudson, N. Carolina, to visit her father who was hopitalized there. When she left she was driving her mother's 1970 Chevrolet Impala, license plate number N. C. EPN-720. When Mrs. Rolon next saw her daughter it was on March 19, 1977, at Miller's Funeral Home. The girl was dead.

Travis Durant testified that his El Camino pickup truck was stolen from the side of his grocery store on March 14, 1977. He further stated that a new hatchet was in the truck at the time it was stolen. When Mr. Durant recovered his truck the next day , the hatchet was missing.

Officer Richard Ornowsky, of the Lanett, Alabama, Police Department,

stated that in the early morning hours of March 15, 1977, he saw Brian Baldwin driving an ElCamino truck in Lanett; the Respondent was seated on the passenger side of the truck. Officer Ornowsky stopped the truck and asked to see Baldwin's license, they drove away. Ornowsky then pursued the truck; he eventually ran it off the truck and came toward them with gun drawn. Respondent attempted to run until he saw Officer Ornowsky; then at Ornowsky's direction, he halted. Baldwin and the Respondent leaned against the police car and were frisked for weapons. At that time Sergeant Gantt and Officer Hamby arrived. After an open knife was found on Baldwin both men were placed in separate police cars, and read their rights. A search of the truck revealed a set of spare keys and a No. Carolina license plate EPN-720.

Lawrence Sheffield of the Wilcox County Sheriff's Department stated that he went ot Lanett on March 15, 1977, to pick up the Respondent and Baldwin. Before taking them into his custody he searched both men. A set of General Motors car keys was found on Baldwin. The keys were turned over to Sheriff Moody Maness. Sheffield also locked the North Carolina plate in the Sheriff's locker for safekeeping.

Maness testified that the Respondent told him they would find Naomi Rolon in the trurk of the car, unharmed. The Respondent rode with Deputy Young and Deputy Sheffield to where the auto was abandoned. Authorities eventually found the nude body of Ms. Rolon under some pine brush near the front of the car. The

keys found on Baldwin started the automobile belonging to Ms. Rolon.

After it had been established that the Respondent acted voluntarily, State investigator Edward Headley testified that in the presence of other law enforcement officials and himself, the Repondent made a statement. This statement was electronically recorded and played to the jury. In this statement the Respondent told how he and Brian Baldwin escaped from the Hudson Prison unit in Hudson, North Carolina. After that they seized Ms. Rolon's automobile and took her to Charlotte, N. C. There they tried to rape her and choke her. There after Ms. Rolon was subjected to being run over by the automobile and being locked in the trunk of the automobile, and being stabbed with a knife in several parts of her body, Finally, the hatchet was taken from

Durant's truck was used to chop a huge hole in her neck. During the time of mistreatment, the Respondentand his companion travelled through various parts of North Carolina , Georgia, and Alabama.

State toxicologist Jim Small performed the autopsy on the victim's body. He discovered a four-inch by two-inch hole at the base of the victim's neck; other cuts and wounds were also present. Small stated that the apparent cause of death was hemorrhage and trauma associated with the large neck wound.

Mr. Small further testified that he found abrasion in the victim's vaginal wall and that semen was present in the vaginal wall.

Petitioner would request further that the court consider these facts as set forth in the original opinion of this case;

According to the undisputed

evidence, some of which included confessions of defendant, on the night of March 12, 1977, Naomi Rolon, sixteen years of age, left her home in Hudson, North Carolina, to visit her father who was hospitalized there. She was driving her mother's 1970 Chevrolet Impala, License Plate N.C. EPN-720. Defendant and Brian Keith Baldwin, who at the time were escapees from the Hudson Prison, seized the automobile and the keys thereof and drove it to Charlotte, N. C. with Naomi therein, despite her protests, pleadings and prayers. At Charlotte they choked her and attempted to rape her. She was stripped of her clothes, stabbed with a knife in various parts of her body, and locked in the trunk of her mother's car. The proceeded from there through part of South Carolina, Georgia via Atlanta, largely on I-85 and reached Montgomery, Alabama. Thereafter they

veered off I-85 and drove to Camden, Alabama, where Baldwin stole the El Camino pickup truck, in which was the hatchet. From Camden, with Naomi in the trunk, down to Highway 41 into Monroe County, Alabama. They drove off the highway into the woods and brush. At that place, Baldwin took Naomi out of the trunk of the automobile and told Horsley to back over her. When he backed up, Naomi stepped out of the way, stumbled into some pine tops. Then Horsley again tried to back over her, but the wheels were spinning. Baldwin took the hatchet out of the stolen truck and killed her with it, saying to her, "Move your hands so I can get it over with." She was moaning before he hit her with the hatchet. A blow from the hatchet caused a large and gaping wound in the base of her neck that caused her death.

The killing occured on the night of March 14, 1977. Horsley and Baldwin

attempted to cover Naomi's body with pine tops and other brush, left the automobile in the woods, proceeded north in the truck they stole in Camden. They arrived in Lanett, Alabama at about 3:00 am on March 15 and were apprehended by the police. In the trunk was the automobile tag that Horsley had taken off the Rolon car.

ARGUMENT

I.

THIS COURT'S DECISION IN BECK DOES NOT MANDATE THE REVERSAL OF EVERY CASE TRIED UNDER THE ALABAMA DEATH PENALTY STATUTUE PRIOR THERETO

REASON FOR GRANTING THE WRIT:
CONFLICT WITH BECK V. ALABAMA
(447 U. S. 625 [1980])

In Beck v. Alabama (447 U. S. 625, 65 L. Ed. 2d 392, 100 S. Ct. 2382 [1980]) this Honorable Court considered the conviction and death sentence of a criminal defendant convicted and sentenced under a statute forbidding the consideration of lesser included offenses. In Beck it was clear and conceded that the evidence would have supported a finding of lesser included offenses. In summarizing the issue before it and its decision, this Honorable Court wrote:

> "...we granted certiorari to decide the following question;
>
> May a sentence of death constitutionally be imposed after a jury verdict of guilty of capital offense, when the jury was not permitted to consider a verdict of guilt of a lesser included non-capital offense, and when the evidence would have supported such a verdict? 444 U. S. 897, 62 L. Ed. 2d 132, 100 S. Ct. 204.
>
> We now hold that the death penalty may not be imposed under these circumstances ..." (447 U. S. 625, 627, 65 L. Ed. 2d 392, 396).

Thus, Beck was carefully limited to its facts. In fact, this Honorable Court expressly declined to extend the Beck rule to non-capital cases. See Note 14, 447 U. S. 625, 638, 65 L. Ed 2d 392, 403.

A review of how the Alabama Courts have applied the Beck rule to cases in which there is no evidence of lesser included offenses follows.

In Ritter v. State ([S. Ct. Ala., 1981] 403 S. 2d 154) the Alabama Supreme Court reversed on the authority of

Beck v. Alabama,[1] supra, the conviction of a criminal defendant who had pleaded guilty to the capital offense, frankly admitted his guilt and demanded the death penalty. In denying rehearing in Ritter the court wrote:

> "...we believe this result is compelled by the decision of the Supreme Court of the United States in Beck and is consistent with the interpretation of that decision reached by the Court of Appeals for the Fifth Circuit in Evans v. Britton, 639 F, 2d 221 [March 19, 1981] (1981) which involved Ritter's partner in this crime..." (emphasis supplied)[2]

---

[1] "...SHORES, JUSTICE
Reversed and remanded to the Court of Criminal Appeals with directions to that Court to grant a new trial under the authority of Beck v. Alabama, 447 U. S. 625, 100 S. Ct. 2382, 65 L Ed. 2d 392 (1980) and Beck v. State, [Ms. Dec. 19, 1980]. 396 So. 2d 645 (Ala. 1980).

REVERSED AND REMANDED."

[2] Pending in this Honorable Court on writ of certiorari sub. nom. Hopper v. Evans, 80-1714, Certiorari granted June 22, 1981, sub. nom. Britton v. Evans 49 U. S. L. Wk. 3954.

Ritter established a pattern for all the pre- Beck cases. Retrial was deemed required by this Honorable Courts decision and opinion in Beck, see, for example Bracewell v. State, (S. Ct. Ala., 1981) 401 So. 2d 130. [3]

---

[3] Initially the writ was denied on June 19, 1981, with a brief memorandum by Justice Maddox, which read:

"Petition for Writ of Certiorari is denied."

"By denying the writ of certiorari in this case, we assume that the Court of Criminal Appeals after reviewing the record in this case, has determined that there was some evidence presented which would have entitled the accused to an instruction on a lesser included offense.

"Writ denied." (unreported manuscript opinion) (emphasis supplied).

However, six (6) days later Justice Maddox's opinion was withdrawn on the Court's own motion, and the following was issued:

"The Opinion dated June 19, 1981, is withdrawn and the following, together with Justice Maddox's special concurring opinion, is substituted in its place.

WRIT DENIED. (Bracewell v. State, [S. Ct. Ala., 1981] 401 So. 2d 130).

Thus, the possibility of a verdict of guilty of a lesser included offense was precluded by the evidence and the constitutional prohibition against arbitrary and capricious verdicts. In other words, the Preclusion Clause had no imp whatever on this case.

Nothing in this Honorable Court's opinion in Beck suggests a mandate for rubber stamp reversals of cases which could not have been affected in any way by the Preclusion Clause. In holding that it did, the Court of Criminal Appeals and Supreme Court of Alabama's decisions and opinions in this case are in conflict with Beck v. Alabama, supra.

A literal interpretation of Beck's "in every case" language is not required as the passage in question itself reveals. In that passage in question , this Court explained that the presence of lesser offense verdict options "may encourage the jury to convict for an impermissible reason"

when the jury has a "belief that the defendant is guilty of some serious [lesser included] crime and should be punished." Beck v. Alabama, 447 U. S. 642. The only time the jury could rationally reach a "belief that the defendant is guilty of some serious [lesser included] crime", is when there is some rational basis in the evidence for such a belief. Therefore, the only cases in which preclusion of lesser offense verdict options could encourage capital offense convictions based on impermissible reasons are cases in which there is at least some evidentiary basis for a verdict convicting the defendant of a lesser offense instead of the capital offense.

The phrase "in every case" must also be limited insofar as it refers to the second "extraneous factor" set out in the paragraph of the Beck

opinion in question, which is that "the apparently mandatory nature of the death penalty may encourage it to acquit for an equally impermissible reason that, whatever his crime, the defendant does not deserve death". 447 U. S. at 642-643 (footnote omitted). This Court cannot have meant that there was a constitutionally intolerable risk of acquittal in Alabama capital cases tried before the Beck decision, because this Court pointed out that there had been a 96% conviction rate in pre- Beck capital cases. 447 U. S. at 641 & n. 18. Surely, a 4% acquittal rate is not intolerably high.

What this Court did mean in the paragraph in question is evident from the particular argument that it was written to answer. Alabama had argued that any effect the preclusion clause might have in influencing a

jury to wrongfully convict a defendant of a capital offense when the evidence showed that the defendant was guilty of a serious lesser offense would be offset by the effect of the seemingly mandatory verdict form requirements. The argument was that when there was an evidentiary basis for a lesser offense, the preclusion clause's push toward improper convictions would be offset by the verdict form's pull toward improper acquittals. Beck v. Alabama, 447 U. S. at 638-641. This Court rejected that argument, id., 639-643; but the important point here is that the language of the Beck opinion referring to an intolerable risk of erroneous factfinding "in every case" was intended to answer it. Because Alabama had argued that in every case like Beck in which there was an evidentiary basis for a lesser included offense there would be an offsetting of pressures on the jury, this Court in rejecting that argument answered that in every such case like Beck's

there would be uncertain and unreliable factfinding. But in cases like the present one where there was evidentiary basis for a lesser included offense, there was no pressure on the jury to erroneously convict the defendant of the capital offense in order to prevent his release, because there was no reason for the jury to believe that he was guilty of a serious lesser offense and should not be acquitted for that reason.

In Ritter v. State, supra, three justices of the Alabama Supreme Court concluded that the Beck decision did not mandate the reversal of a pre- Beck conviction in the unusual case where the record affirmatively and undisputably eliminates any possibility that the defendant was harmed by the existence

of the preclusion clause.[4] That is the correct interpretation of the Beck decision.

---

[4]Those three justices of the Alabama Supreme Court were outvoted by a 6 member majority which concluded, "consisten[ly] with the interpretation of that decision reached by the 5th Circuit," that the Beck decision "compelled" the reversal of all pre- Beck capital convictions regardless of the facts. Ritter , supra, slip op. at 2 (majority opinion) pp. 1a 2a, infra, id., at 3 (Torbert, concurring specially), p. 2a infra.

The fact that a majority of the Alabama Supreme Court, influenced by the 2 member majority in the court below, joined that Court in misinterpreting the Beck decision simply proves that this Court needs to correct both courts. This court thas the opportunity to correct the Alabama Supreme Court's misinterpretation of Beck in Alabama v. Ritter, No. 81-247 (certiorari filed on August 6, 1981.).

II.

THE DECISION BELOW IS CONTRARY TO DECISIONS OF THIS COURT CONCERNING HARM AND PREJUDICE AS A PREREQUISITE TO A DUE PROCESS FUNDAMENTAL FAIRNESS CLAIM AND AS A PREREQUISITE TO A REVERSAL WHEN A CONSTITUTIONAL VIOLATION IS ESTABLISHED

The decision below by the Alabama Courts is not based on any finding that the jury which convicted the Respondent would have been instructed on any lesser included non-capital offense had it not been for the preclusion clause, nor is the decision below based on any finding that the mere existence of the preclusion clause actually affected Respondent's defense strategy. What the court below did was to ignore the mandate of Beck v. Alabama, 447 U. S. 625 (1980) and follow the Fifth Circuit's erroneous decision in Evans v. Britton, 628 F. ed 400 (5th Cir. 1980) opinion extended, 639 F. 2d (1981), cert, gran., No. 81-1714 (U.S. June 22, 1981). In effect the Court below reached a decision which was based

on a holding that harm and prejudice are not necessary to a fundamental fairness claim based on Due Process Clause of the United States Constitution.

It is the position of the Petitioner that the preclusion clause does not in any way harm or prejudice Respondent since there was no evidentiary basis to charge the jury which convicted the Respondent on any lesser included offenses. It is clear that under Alabama law a defendant is only entitled to a lesser included offense instruction if there is some evidentiary basis for it. See, e. g., Beck v. Alabama, 447 U. S. at 630 n. 5., quoting Fulghum v. State, 291 Ala. 71, 75, 277 So. 2d 886, 890 (1973).

For these reasons the petitioner must again state that the Alabama court below misapplied Beck v. Alabama, supra, by holding that the Federal Constitution requires the respondent's conviction be overturned even though there is no evidence that the respondent was harmed or prejudiced in any way by the preclusion clause.

The finding by the court below that there is no requirement of harm or prejudice seems to fly in the face of this Honorable Court's decision in regard to fundamental fairness. Donnelly v. De Christoforo, 416 U. S. 637, 642 (1974). It is difficult to imagine how a defendant such as the respondent can argue that he has been treated unfairly when that treatment did not harm or prejudice him in any way. There should be no finding of a lack of fundamental fairness where there is no finding of some harm of prejudice that inured to

the respondent. The fundamental fairness violation can not exist independently without the harm and prejudice factor. They must coincide with and are necessarily related to each other.

Prejudice is a necessary element of a due process claim concerning pre-indictment delay. United States v. Locasco, 431 U. S. 783, 789-790 (1977), United States v. Marion, 404 U. S. 307, 325-326 (1971) ("the real possibility of prejudice inherent in any extended delay" is not sufficient, and defendants must "demonstrate actual prejudice".) Prejudice is also a prerequisite of a due process claim involving the suppression of exculpatory evidence, as United States v. Agurs, 427 U. S. 97 (1976), makes clear. Therefore, the decisions of this Court establish that a finding of harm and prejudice is an essential componet of a due process fundamental fairness claim.

In addition, decisions of this Court establish that even where some constitutional right is violated, a related conviction should not be set aside if the violation did not contribute to the conviction. This Court has recognized "the general rule that remedies should be tailored to the injury suffered from the constitution violation and should not unnecessarily infringe on competing interests", United States v. Morrison, 101 S. Ct. 665, 668 (1981), and it has ruled accordingly. See e.g., id., at 667-669 (remedy for violation of right to counsel dependant on extent of harm caused by the infringement); United States v. Blue, 384 U. S. 251, 255 (1966) (remedy for violation of the Fifth Amendment is exclusion of statement, not barring the prosecution); Brady v. Maryland, 372 U. S. 83, 88-90 (1963) (remedy for suppression of evidence material only to sentencing is

limited to ordering a new sentence proceeding). Even where a constitutional violation stems from "the egregious behavior of the governmental agents", no remedy is to be imposed on direct or collateral appeals in the absence of harm. United States v. Morrison, 101 S. Ct. at 669.

Thus it can be seen that the decision by the Alabama Court below not only misinterprets Beck v. Alabama, supra, but it also misapplies and misinterprets Alabama law and other prior decisions of this Court. Noted above.

For this reason the decision below should not be allowed to stand absent some review by this Court. Therefore, this Court should grant this petition and consider the merits of the argument of these issues.

III.

IN THE ALTERNATIVE, THIS PETITION SHOULD NOT BE DECIDED UNTIL THE COURT DECIDES THE EVANS CASE

This brief and petition raise for this Court's consideration several separate yet related, important federal questions. Those questions deal with the proper interpretation of Beck v. Alabama, 447 U. S. 625 (1980) and the matter of the harm and prejudice requirement. These questions, the related facts and the law, are almost identical to those raised and now under consideration in Hopper v. Evans, No. 80-1714 (cert. gran. June 22, 1981).

While there was no guilty plea in the present case as there was in the Hopper v. Evans case, it is still contended that the similarities between that case and this one are significant.

In addition the petitioner would

note that there are numerous other cases which are pending (Petition for Certiorari applied for) in this Court which also raise substantially similar legal issues. See: Alabama v. Wright, No. 81-1287 (cert filed Jan.11, 1982); Alabama v. Daniels, No. 81-1397 (cert filed Jan. 25, 1982); Alabama v. Bryars, No. 81-1513 (cert filed Feb. 8, 1982); Alabama v. Hill; No. 81-1515 (cert filed Feb. 8, 1982). Alabama v. Davis, No. 81-1664(cert filed Mar. 4, 1982). Because of the substantial similarity in the questions to be decided it is respectfully asked that if certiorari is not granted in this case (and the other now pending) then this case should be held until a decision is issued in Hopper v. Evans, supra.

CONCLUSION

In conclusion the Petitioner, the State of Alabama, respectfully submits that the decisions and opinions of the Court of Criminal Appeals and the Supreme Court of Alabama in this case present conflicts with the prior decisions and opinions of this Honorable Court. For this reason the Petitioner prays that this Honorable Court will issue the Writ of Certiorari and review the decision and opinions of the Alabama Court of Criminal Appeals and Supreme Court of Alabama and on such review will reverse the decisions of said Courts granting a new trial to the Respondent.

CHARLES A. GRADDICK
ATTORNEY GENERAL

EDWARD E. CARNES
ASSISTANT ATTORNEY GENERAL

J. ANTHONY McLAIN
SPEC. ASS'T. ATTOR. GENERAL

CERTIFICATE OF SERVICE

I, J. Anthony McLain, a special assistant attorney general of Alabama, and a member of the Bar of the Supreme Court of the United States and one of the attorneys for the State of Alabama, Petitioner, do hereby certify that on this _____day of March, 1982, I did serve the requisite number of copies for the foregoing on the attorney for the Respondent, by mailing same to him, first class postage prepaid and addressed as follows:

_____
J. Anthony McLain
Spec. Ass't Attor.General

OF COUNSEL:

Office of the Attorney General
250 Administrative Building
64 N. Union Street
Montgomery, AL 36130

APPENDIX " A "

IN THE COURT OF CRIMINAL APPEALS

STATE OF ALABAMA

October 6, 1981

Re: EDWARD HORSLEY

V.

STATE OF ALABAMA

1 Div. 931

Appealed from the Circuit Court of
Monroe County, Alabama
No. CC-77-52

REVERSED AND REMANDED
on the authority of Beck v. State

No opinion.

All the Judges Concur.

APPENDIX " B "

IN THE SUPREME COURT OF THE
STATE OF ALABAMA

January 29, 1982

RE: 81-216

EX PARTE: STATE OF ALABAMA

PETITION FOR WRIT OF CERTIORARI TO THE
COURT OF CRIMINAL APPEALS OF ALABAMA

RE: EDWARD HORSLEY

V.

STATE OF ALABAMA

Petition denied.

No. Opinion.

Embry, J., Torbert, CJ., Faulkner, Almon, and Adams, JJ., Concur.

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ALEXANDER L. STEVAS,
CLERK

MAY 27 PAGE 3

NO. 81-1809

IN THE SUPREME COURT OF

THE UNITED STATES

OCTOBER TERM 1981

STATE OF ALABAMA,

PETITIONER,

VS.

EDWARD HORSLEY,

RESPONDENT.

SUPPLEMENTAL RESPONSE TO PETITION FOR CERTIORARI

The State of Alabama petitions here for a writ of certiorari to review the decision of the Alabama Appellate Courts to remand Respondent's criminal case for new trial. This Court's decision in O'Dell v. Espinoza, _____ U.S. _____, 50 U.S.L.W. 4477 (May 3, 1982) requires that the petition for certiorari filed herein be denied. In O'Dell this Court held that the decision to remand a case for new trial (by a State Court) is not a "final judgment" under 28 U.S.C. § 1257 and therefore, this Court has no jurisdiction to review the decision. Therefore this cause is due to be dismissed for want of jurisdiction.

Submitted by,

Jack Drake
DRAKE, KNOWLES & PIERCE
Post Office Box 86
Tuscaloosa, Alabama 35402

ATTORNEY FOR RESPONDENT

CERTIFICATE OF SERVICE

I, Jack Drake, the undersigned attorney, do hereby certify that prior to filing the foregoing or immediately thereafter, I caused to be mailed a true and correct copy of same, United States postage prepaid, and correctly addressed to Hon. Charles Graddick and Hon. Edward Carnes.

Done this 10 day of May, 1982.

Russell H. Drake
Attorney for Respondent

NO. 81-1809

IN THE SUPREME COURT OF

THE UNITED STATES

OCTOBER TERM 1981

STATE OF ALABAMA,

PETITIONER,

VS.

EDWARD HORSLEY,

RESPONDENT.

MOTION TO DISMISS

Respondent moves to dismiss this action because the State Court decision sought to be reviewed is not "final" within the meaning of 28 U.S.C. § 1257 as noted in O'Dell v. Espinoza, _____ U.S. _____, 50 U.S.L.W. 4477 (May 3, 1982).

Submitted by,

Jack Drake
DRAKE, KNOWLES & PIERCE
Post Office Box 86
Tuscaloosa, Alabama 35402

ATTORNEY FOR RESPONDENT

CERTIFICATE OF SERVICE

I, Jack Drake, the undersigned attorney, do hereby certify that prior to filing the foregoing or immediately thereafter, I caused to be mailed a true and correct copy of same, United States postage prepaid, and correctly addressed to Hon. Charles Graddick and Hon. Edward Carnes.

Done this 10 day of May, 1982.

Attorney for Respondent

Office - Supreme Court, U.S.
FILED
MAY 10 1982
ALEXANDER L. STEVAS
CLERK

NO. 81-1809

IN THE SUPREME COURT OF

THE UNITED STATES

OCTOBER TERM 1981

STATE OF ALABAMA,

PETITIONER,

VS.

EDWARD HORSLEY,

RESPONDENT.

RUSSELL J. DRAKE
DRAKE, KNOWLES & PIERCE
Post Office Box 86
Tuscaloosa, Alabama 35402
(205) 759-1234

ATTORNEY FOR RESPONDENT

STATEMENT OF THE CASE

Edward Horsley was convicted in the Circuit Court of Monroe County, Alabama under § 13-11-2(a)(2) Ala. Code (1975), which charged him with the offense of "aggravated robbery," i.e., robbery where the victim is intentionally killed during the course of the robbery. He was sentenced to death. The Alabama Court of Criminal Appeals and the Alabama Supreme Court both affirmed the conviction and death sentence. This Court granted certiorari and reversed and remanded the case in light of Beck v. Alabama, 447 U. S. 625 (1980).

Without opinion, the Alabama Court of Criminal Appeals reversed and remanded the case for new trial. The State of Alabama petitioned the Supreme Court of Alabama for a writ of certiorari to review the Court of Criminal Appeals decision. The writ was denied without opinion. The State of Alabama now asks this Court to issue a writ of certiorari to review the Alabama Courts' decision that Respondent Horsley is entitled to a new trial.

STATEMENT OF FACTS

Edward Horsley and his companion Brian Baldwin seized Naomi Rolon in Hudson, North Carolina. They drove her to Monroe County, Alabama, where Baldwin killed her by striking her with a hatchet.

REASONS WHY THE WRIT SHOULD BE DENIED

The Petition for Certiorari filed by the State of Alabama should be denied for the following reasons:

I. EVIDENCE PRESENTED AT TRIAL WOULD SUPPORT A JURY VERDICT OF A LESSER INCLUDED OFFENSE

In Beck v. Alabama, 447 U.S. 625 (1980), this Court found the Alabama death penalty statute to be unconstitutional in that it totally precluded a jury from considering a lesser included offense. There is no conflict with the Beck decision and the decisions of the Alabama Courts in the instant case.

Respondent here has ample facts to argue to the jury that a verdict of guilty for a lesser included offense should be returned. Those factual considerations include:

(A) The Robbery Occurred In North Carolina.

Throughout his prosecution the State of Alabama has argued that Respondent committed robbery by taking Naomi Rolon's car and car keys from her in North Carolina. If that act or acts constitute robbery then the act or acts were committed in North Carolina. Respondent can argue at his new trial that he did not commit the offense of robbery in Alabama, and therefore, could not be convicted of robbery where the victim is intentionally killed. He can argue that the jury could only convict him of murder, a non-capital offense.

(B) Respondent Did Not Intend To Kill The Victim.

The victim here was killed by a co-defendant. Respondent can argue that, while he may be guilty of non-capital murder, he did not "intentionally" kill the victim and that therefore, he should not be convicted of robbery where the victim is intentionally killed.

Accordingly, on the basis of the State's own evidence, without any affirmative defense by Respondent, Respondent can argue at his new trial, that he is entitled, on the facts, to a verdict of guilty of a lesser included offense.

II. THIS PETITION IS TO BE DISTINGUISHED FROM HOPPER V. EVANS, CASE NO. 80-1714 (CERT. GRANTED JUNE 22, 1981).

The State of Alabama argues that this Petition should not be decided until an opinion is rendered in Hopper v. Evans, supra.

Hopper v. Evans presents different facts, came to this Court by a different route, and presents far more complicated legal issues.

Hopper v. Evans does not factually present the issue of a robbery committed in one state and the killing of the victim in another. Additionally, the victim in Hopper v. Evans was shot by the Defendant Evans. Accordingly, Respondent here has at least two factual arguments not available in Evans.

Moreover, Evans began by habeas corpus and came to this Court by the route of 28 U.S.C. § 1254(1).

Finally, Evans involves a number of complex legal issues, whereas this case is simple and basically fact-based. Evans provides the Court with a full blown opinion [1] to review while here there is not a written opinion by either Alabama Court.

Finally, it should be noted that in Evans the Defendant entered a plea of guilty. Respondent here pleaded not guilty.

CONCLUSION

For the reasons noted above the Petition for Certiorari is due to be denied.

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[1] Evans v. Britton, 628 F.2d 400 (5th Cir. 1981).

Submitted by,

Jack Drake
DRAKE, KNOWLES & PIERCE
Post Office Box 86
Tuscaloosa, Alabama 35402

ATTORNEY FOR RESPONDENT

CERTIFICATE OF SERVICE

I, Jack Drake, the undersigned attorney, do hereby certify that prior to filing the foregoing or immediately thereafter, I caused to be mailed a true and correct copy of same, United States postage prepaid, and correctly addressed to Hon. Charles Graddick, Edward Carnes, J. Anthony McLain.

Done this 6 day of May, 1982.

Attorney for Respondent

Office-Supreme Court, U.S.
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MAY 20 1982
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MOTION TO PROCEED IN FORMA PAUPERIS

Comes now the Respondent Edward Horsley, through counsel, and moves the Court to allow him to proceed in forma pauperis and in support thereof shows as follows:

(1) Edward Horsley is presently an inmate in the Alabama prison system. An affidavit in support of this motion has been sent to Horsley for signing and notarization. The affidavit will be filed in this Court as promptly as possible.

(2) Horsley is indigent. He has no financial resources whatsoever.

At every stage of this case he has been represented by appointed counsel. The undersigned counsel has not been appointed but has donated his services to Respondent.

(3) Horsley is unable to pay the costs and fees normally required by this Court.

(4) Horsley has not initiated this proceeding; he believes that his position to be advanced here should prevail.

Submitted by,

RUSSELL J. DRAKE
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(205) 759-1234

ATTORNEY FOR RESPONDENT

CERTIFICATE OF SERVICE

I, Russell J. Drake, the undersigned attorney, do hereby certify that prior to filing the foregoing or immediately thereafter I caused a true and correct copy of the foregoing to be mailed, United States postage prepaid and correctly addressed to Charles Graddick, Edward Carnes, and J. Anthony McLain.

Done this 5th day of May, 1982.

Russell J. Drake
Attorney for Respondent

Office - Supreme Court, U.S.
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No. 81-1809

IN THE SUPREME COURT OF THE

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STATE OF ALABAMA,

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VS.

EDWARD HORSLEY,

RESPONDENT

MEMORANDUM BRIEF IN OPPOSITION TO MOTION TO DISMISS AND IN REPLY TO SUPPLEMENTAL RESPONSE TO PETITION FOR CERTIORARI

CHARLES A. GRADDICK
ATTORNEY GENERAL OF ALABAMA

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MEMORANDUM BRIEF IN OPPOSITION TO MOTION TO DISMISS AND IN REPLY TO SUPPLEMENTAL RESPONSE TO PETITION FOR CERTIORARI

The Respondent has filed a Motion to Dismiss and a Supplemental Response to Petition for Certiorari contending that the State of Alabama's Petition for Certiorari seeks review of a state court decision which is not "final" within the meaning of 28 USC §1257, per the decision in O'dell v. Espinoza, _____ US_____, 50 USLW 4477 (May 3, 1982).

The Petitioner submits that Respondent's reliance on O'dell v. Espinoza is unfounded in the facts of the case at bar.

The opinion in O'dell v. Espinoza cites the case of Cox Broadcasting Corp. v. Cohn, 420 US 469, as delineating those situations in which finality as to the federal issue has been found by this Honorable Court despite the ordering of further proceedings in the lower state courts. In Cox, supra, one

such exception is set forth as existent in cases where the federal claim is finally decided, with further proceedings on the merits in the state courts to come, but in which later review of the federal issues cannot be had, whatever the ultimate outcome of the case. In that class of cases, if the petitioner prevails on the merits, the federal issue would be mooted; if he were to lose on the merits, the governing state law would not permit him again to present his federal claims for review.

Petitioner submits that the facts of the case sub judice bring it within the jurisdictional review of this Honorable Court. If the State of Alabama loses on the merits at a retrial of this matter, it would have no appeal. The order of the Alabama Supreme Court is "final" as to the federal issue and therefore ripe for review by this Honorable Court.

To support this contention the Petitioner would rely on the case of

California v. Stewart, 384 U.S. 436. In that case the judgement in the state court directed retrial of the case . In footnote 71 of its opinion this Court held that since the facts were such that if the respondent were successful in obtaining an acquittal on retrial the State would have no appeal, the judgement of the lower state court was "final" as to the federal issue even though a retrial was ordered. In Mills v. Alabama, 384 U.S. 214, this Court found finality in a criminal case wherein the Alabama Supreme Court decided the constitutionality of a statute but also ordered retrial of the defendant.

Petitioner submits that the facts of the case at bar place it within the class of cases reviewable by this Court as "final" judgement of the highest state court. The facts of O'dell v. Espinoza are so dissimilar from those at bar that the bar from review enunciated therein is inapplicable. The judgement is "final" within the meaning

of 28 U.S.C. §1257 and proper for review by this Honorable Court.

Respectfully submitted,

CHARLES A. GRADDICK
ATTORNEY GENERAL FOR THE
STATE OF ALABAMA
BY:

_____
J. ANTHONY McLAIN
SPEC. ASST. ATTORNEY GENERAL

CERTIFICATE OF SERVICE

I hereby certify that on this date I did serve a copy of the foregoing on the attorney for the Respondent:

Honorable Jack Drake
Drake, Knowles, & Pierce
Post Office Box 86
Tuscaloosa, AL 35402

by placing said copy in the United States Mail with postage prepaid and correctly addressed.

Done this the _____ day of May, 1982.

_____

J. ANTHONY McLAIN
SPECIAL ASST. ATTOR. GENERAL